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No.

IN THE

Supreme Court of the United States

GNC FRANCHISING, INC.,
Petitioner,

v.

CHARLES B. JONES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), the Supreme Court held that a forum selection clause is presumptively valid and will be honored unless enforcement would violate a "strong public policy" of the forum in which the suit is brought. On a motion to dismiss under 28 U.S.C. § 1406(a) brought in a federal diversity action, can a state statute condemning forum selection clauses serve by itself as the requisite "public policy" under *Bremen*, even though as a matter of procedural law the statute cannot be enforced directly?

2. Does a party seeking to enforce a forum selection clause through a motion to transfer venue under 28 U.S.C. § 1404(a) retain the burden of proof at all times, as the Ninth Circuit held here – or, as the Eleventh and Third Circuits have held, does the burden shift to the opposing party once the movant has established the underlying validity of the forum selection clause?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT

The parent companies of GNC Franchising, Inc. are General Nutrition, Incorporated and General Nutrition Companies, Inc. General Nutrition Companies, Inc., in turn, is wholly owned by Royal Numico N.V.

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PETITION FOR WRIT OF CERTIORARI

Petitioner GNC Franchising, Inc. ("GNC") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit dated May 3, 2000. The Ninth Circuit affirmed an order of the United States District Court for the Central District of California (the "District Court") refusing to enforce, by dismissal or transfer, a forum selection clause contained in GNC's franchise agreement with Respondent, Charles Jones ("Jones").

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion was reported as *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000). The opinion is reproduced as Appendix A.

The Ninth Circuit previously had granted GNC's petition for permission to file an appeal under 28 U.S.C. § 1292(b). The Ninth Circuit's order granting that permission is reproduced as Appendix B, and the District Court's order pursuant to stipulation certifying this matter for an interlocutory appeal is reproduced as Appendix C. Neither order was reported.

The District Court's underlying order denying GNC's motion to dismiss or transfer, which also was not reported, is reproduced as Appendix B.

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this matter on May 3, 2000. No rehearing of the Ninth Circuit's decision was requested, nor did Petitioner request an extension of time to file its petition for certiorari.

The statutory provision that confers jurisdiction on this Court is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following federal and California state statutes are involved in this matter:

> **28 U.S.C. § 1292(b) Interlocutory decisions**
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made

to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1404(a) Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1406(a) Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Cal. Bus. & Prof. Code § 20040.5 Restriction of venue to forum outside state

A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.

STATEMENT OF THE CASE

This case involves a dispute between Petitioner GNC and Respondent Jones concerning a GNC franchise store Jones previously operated in LaVerne, California. In entering into his franchise agreement with GNC, Jones expressly agreed that if he were to institute any legal action against GNC under the franchise agreement, he would do so only in the Commonwealth of Pennsylvania, in which GNC's principal place of business is located.

Jones breached this provision of the franchise agreement by commencing an action against GNC in the Los Angeles Superior Court. Because there was complete diversity among the parties, and the amount in controversy exceeded $75,000, GNC removed the case to the United States District Court for the Central District of California.[1]

Seeking to enforce the parties' forum selection clause, GNC filed a motion to dismiss Jones' action for improper venue, pursuant to 28 U.S.C. § 1406(a) ("Section 1406(a)"). GNC also asked the District Court, in the alternative, to transfer the matter to the Western District of Pennsylvania on the authority of 28 U.S.C. § 1404(a) ("Section 1404(a)").

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[1] Thus, the District Court had diversity jurisdiction over the parties' dispute pursuant to 28 U.S.C. section 1332. *See* Sup. Ct R. 14(g)(ii).

The District Court denied the motion to dismiss, finding that enforcing the forum selection clause would violate a "strong public policy" of the state of California, which purports to invalidate such clauses contained in franchise agreements. *See* Cal. Bus. & Prof. Code § 20040.5 ("Section 20040.5"). That statute provides that "a provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." The District Court also denied GNC's alternative motion to transfer, on the ground that factors of "convenience" favored keeping the case in California.

The District Court recognized that these issues were important matters of first impression, and therefore certified its order for immediate appeal to the Ninth Circuit, pursuant to 28 U.S.C. § 1292(b). (Appendix C.) GNC filed with the Ninth Circuit a petition for permission to appeal, which was granted on April 22, 1999. (Appendix B.)

The Ninth Circuit affirmed the District Court's order, based on its interpretation of the Supreme Court's opinion in M/S *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)(contractual forum selection is "unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought"). *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). The Ninth Circuit found that the mere existence of a statute forbidding enforcement of a forum selection clause is a

sufficient reason for a court to refuse such enforcement on "policy" grounds:

> We conclude and hold that § 20040.5 expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue. A provision, therefore, that requires a California franchisee to resolve claims related to the franchise agreement in a non-California court directly contravenes this strong public policy and is unenforceable under the directives of *Bremen*.

Id. at 498.

The Ninth Circuit also affirmed the District Court's denial of GNC's motion to transfer under Section 1404(a). That decision was premised on the Ninth Circuit's holding that a party seeking to enforce a forum selection clause on a Section 1404(a) motion bears the burden of proof. *Id.* at 499 n.22.

REASONS FOR GRANTING THE WRIT

The Court has expressed a strong interest in correctly resolving questions as to the validity of contractual forum selection provisions. A dozen years ago, the Supreme Court made it clear that a state's public policy disfavoring forum selection clauses is insignificant to a district court's analysis on a Section 1404(a) motion for transfer. *See Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988). This case presents the Court with the opportunity, for the first time, to address the limits of a state's influence over federal venue determinations in the parallel context of a motion to dismiss under Section 1406(a). More fundamentally, this Court has the chance to resolve the confusion among lower courts on this issue by defining the type of "public policy" that, under *Bremen*, is relevant when deciding whether to enforce a private venue agreement.

Finally, the Court should grant review so it can resolve the deepening circuit split on the important federal question of whether the party challenging a forum selection clause has the burden of proof in a Section 1404(a) motion to transfer.

1. The Ninth Circuit's Opinion, That Section 20040.5 Reflects A Relevant Public Policy Under *Bremen*, Involves An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By The Court And Which Is In Conflict With The Reasoning Of *Bremen* And Its Progeny

A. The Validity Of Forum Selection Clauses Involves An Important Question Of Federal Law That Can Only Be Satisfactorily And Definitively Resolved Through This Court's Intervention

There can be no dispute that the Ninth Circuit's opinion implicates "important questions of federal law" that merit resolution by this Court. *See* Sup. Ct. R. 10(c). The District Court recognized that the venue questions raised by the dispute between Jones and GNC were important matters of first impression as to which there was a substantial ground for disagreement, certifying for immediate appeal its denial of GNC's motion to dismiss. (Appendix C.) The Ninth Circuit similarly recognized the importance of the matters before it, initially by granting GNC's petition for permission to file an interlocutory appeal (Appendix B), and later by publishing its opinion.[2]

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2 Circuit Rule 36-2 of the United States Court of Appeals for the Ninth Circuit provides that a disposition shall be published as an

Moreover, the concurring and dissenting opinions in *Stewart* demonstrate the critical importance of the venue issue presented by this petition, and the propriety of granting review. Justices Kennedy and O'Connor, before concluding that a valid forum selection clause should be given "controlling weight in all but the most exceptional cases," observed that:

> The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions.

Stewart, 487 U.S. at 33 (Kennedy, J., concurring).

As the sole dissenting voice in *Stewart*, Justice Scalia expressed a similar sentiment, but even more strongly:

> It is difficult to imagine an issue of more importance, other than one that goes to the very merits of the lawsuit, than the validity of a contractual forum-selection provision.

Id. at 40 (Scalia, J., dissenting).

Nothing has changed in the twelve years since *Stewart* was decided to diminish the importance of this

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opinion only if it meets one or more of six criteria. Of those criteria, two presumably were relevant to the Ninth Circuit's decision to order publication: subsections (a) (the decision "[e]stablishes, alters, modifies or clarifies a rule of law") and (b) (the decision "[i]nvolves a legal or factual issue of unique interest or substantial public importance").

issue. In fact, the continued expansion of commerce across formerly impregnable borders, as well as the continued confusion among lower courts as to the correct resolution of venue questions where forum selection clauses are involved, make the issue even more critical.

B. Review Should Be Granted So That This Court, For The First Time, Can Answer The Important Question Of Whether A Relevant Public Policy For Purposes Of A *Bremen* Analysis Is The Forum State's View Of Private Venue Agreements

The Court's opinion in *Bremen* marked a watershed in the judiciary's view of forum selection clauses. Prior to that decision, such clauses were often met with hostility, with courts refusing to enforce them because they purportedly contravened public policy and ousted courts of their jurisdiction. *Bremen*, 407 U.S. at 9. The *Bremen* Court strongly criticized the "vestigial legal fiction" that led to this resistance and observed specifically that judicial resistance to reducing the power of a particular court reflected an unduly "provincial attitude" and had "little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets." *Id.* at 12. The *Bremen* Court then announced a new principle: a forum selection clause is presumed enforceable, and can only be defeated by a showing that

enforcing the clause would be "unreasonable." *Id.* at 10-11.

Bremen also offered what appeared to be an alternative ground for refusing to enforce a private venue agreement:

> A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Id. at 15.

Although the *Bremen* test has been widely followed and its applicability expanded beyond the admiralty context in which it was decided,[3] the Supreme Court has never resolved a crucial issue: can a state's antipathy towards forum selection clauses in itself serve as the "strong public policy" that will defeat enforcement of such a clause?

The *Bremen* Court's reasoning, and subsequent allusions by the Supreme Court, strongly indicate that – contrary to the Ninth Circuit's decision – the answer to that question must be no. It would be nonsensical to interpret *Bremen* as holding that a state policy against forum selection clauses is the type of strong public policy that may defeat enforcement, when the *Bremen* Court

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3 *See, e.g., Stewart Organization v. Ricoh Corp.*, 487 U.S. 22, 33 (1998) (Kennedy, J., concurring); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320 (9th Cir. 1996); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).

expressly rejected such provincial concerns and announced a new public policy in favor of such clauses. *See Bremen*, 407 U.S. at 9-15. Otherwise, the *Bremen* public policy exception would quickly swallow the rule, since there would be no limit to the ability of state legislatures to enact protectionist statutes nullifying forum selection clauses as a matter of "policy."

In support of its new rule, the *Bremen* Court cited *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263 (1949) as an example of a situation in which a public policy might defeat enforcement of a forum selection clause. *Boyd* involved a dispute under the Federal Employers' Liability Act ("FELA"). The Supreme Court found that Section 6 of FELA, which identified where venue would be proper, created a "substantial right" to bring actions in such venues. The parties, however, entered into a contract containing a forum selection clause that was more limited than Section 6. The Supreme Court found the contract violated Section 5 of FELA, which voided contracts that would relieve an employer of liability under FELA. *Boyd*, 338 U.S. at 265-266. Thus, the public policy at issue in *Boyd* was not found in Section 6 of FELA, dealing expressly with venue – but rather in Section 5, which was concerned with protecting a plaintiff's ***substantive*** rights under the law. In other words, the venue statute alone was not the basis for the Court's opinion; the Court was concerned with the question of venue only insofar as it directly implicated, or was implicated in, a waiver of substantive rights.

Similarly, the *Bremen* Court noted that in a hypothetical case "selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum." *Bremen*, 407 U.S. at 17. Thus, again, *Bremen* indicates that to constitute grounds for rebutting the presumption that a forum selection clause is enforceable, a proffered public policy must relate to the parties' substantive rights under the original forum's laws.

In 1985, the Court noted that a waiver of substantive rights could defeat a forum selection clause in an arbitration agreement as against public policy. In *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the Supreme Court held that the Federal Arbitration Act authorized arbitration of Sherman Act claims that were covered by a valid arbitration agreement. Nonetheless, by way of a footnote, the Court observed in *dictum* that:

> [I]n the event the choice-of-forum and choice-of-law clauses ***operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations***, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n. 19 (citations omitted) (emphasis added).[4]

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4 Without an express pronouncement from this Court, lower courts are at a loss as to how to apply the *Bremen* public policy test. Indeed, just two years before its decision in *Jones*, the Ninth Circuit

The Supreme Court later quoted the *Mitsubishi* footnote with approval in *Vimar Seguros y Reaseguors, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). In *Vimar*, the Court enforced a forum selection clause in an arbitration agreement that required arbitration in Tokyo applying Japanese law. The Court found that enforcement of the arbitration agreement would not cause plaintiff to lose any substantive rights under the Carriage of Goods by Sea Act, even though Japanese law would apply if the arbitration agreement were enforced. Since substantive rights would not be affected, there was no policy reason to decline enforcement of the arbitration agreement. *Id.* at 540.

In the 28 years since it decided *Bremen*, the Court has not had, until now, the opportunity to finally determine whether the *Bremen* "public policy" exception must be independent of the forum's views on forum selection clauses. Meanwhile, the Ninth Circuit has stepped in to fill that void by creating a new rule for enforcing forum selection clauses that cannot be reconciled with *Bremen* and its progeny, and that sends jurisprudence back to the "provincialism" of pre-*Bremen* days.

The Ninth Circuit's analysis was based on a simple, but flawed, line of reasoning: under *Bremen*, a forum selection clause will not be enforced if doing so would

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complained that "[w]ithout question this case would be easier to decide if this footnote in *Mitsubishi* had not been inserted." *Richards v. Lloyds of London*, 135 F.3d 1289, 1295 (9th Cir. 1998) (enforcing a forum selection clause would not violate public policy behind United States antitrust laws).

violate a "strong public policy of the forum"; California adopted Section 20040.5, which purports to void forum selection clauses in franchise agreements; in a diversity case, enforcing a forum selection clause is a matter of federal procedural law, and thus Section 20040.5 could not be enforced directly by a district court; however, Section 20040.5 reflects a strong public policy of that state; therefore, enforcing the forum selection clause would per se violate a strong public policy of the state of California. *Jones*, 211 F.3d at 498.

In effect, the Ninth Circuit used *Bremen* to create a loophole in the doctrine of federal supremacy in venue matters. A state can now control federal venue questions in diversity matters by enacting a statute condemning forum selection clauses and then claiming that statute reflects the "public policy" of the state to which a federal court must yield. According to the Ninth Circuit, even though such state statutes cannot be given effect directly in a diversity action, district courts are free to engage in de facto enforcement of the statutes under the rubric of "public policy." This flies in the face of the Court's reasoning in *Bremen*, and turns on its head the *Erie* doctrine.[5]

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5 *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (in a diversity case, a District Court must apply state substantive law, but, where it exists, federal procedural law). The *Erie* doctrine "remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990).

In one of the few express discussions of the issue in the case law, one court specifically, and sensibly, rejected the notion that a state's prohibition against forum selection clauses can itself constitute a "strong public policy" entitled to consideration under *Bremen*. *See Benge v. Software Galeria, Inc.*, 608 F.Supp. 601, 608 (E.D. Mo. 1985). Noting that accepting such an argument would create an "absurd result," the *Benge* court explained:

> If a State's rule with respect to the enforceability of forum selection clauses is a relevant public policy under *The Bremen*, then there would be no need to apply Federal law, because the Federal rule would then be the forum rule in every case. In the opinion of this Court, the public policy that is relevant under *The Bremen* must be some policy that is independent of the forum's view of forum selection clauses.

Id.

Similarly, in a case cited by approval in *Benge*, another district court held that because federal law governs the enforceability of a forum selection clause in a diversity action, a Texas statute prohibiting enforcement of such clauses was irrelevant to the court's determination of the venue question before it. *See Hoffman v. Burroughs Corp.*, 571 F.Supp. 545, 550 (N.D. Tex. 1982).

The *Benge/Hoffman* analysis is consistent with this Court's decisions in *Bremen*, *Boyd*, *Mitsubishi* and *Vimar*. Although, as trial court decisions, *Benge* and *Hoffman* do

not reflect a circuit split on this issue,[6] *Benge* in particular casts a harsh light on the flawed reasoning of the Ninth Circuit in this case.

Given the Court's reasoning in *Bremen*, its express reliance in that case on *Boyd*, and its subsequent focus on whether enforcing a forum selection clause would deprive a party of substantive rights separate and apart from venue, this Court should grant review and find a state statute prohibiting enforcement of forum selection clauses, without more, is irrelevant to determining whether a "strong public policy" precludes enforcement.[7]

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6 In *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964), the Supreme Court stated that it had granted certiorari because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts...." One commentary cites *Calhoon* for the proposition that a conflict between a district court decision and a decision by a court of appeals "is generally not a sufficient ground to grant the writ, although the existence of such a conflict may enhance a petition that exemplifies one or more of the illustrations in Supreme Court Rule 10." 23 Moore's Federal Practice § 510.21(1) (Matthew Bender 3d ed.) (footnote omitted).

7 The Court's analysis should include a consideration of whether its holding in *Stewart* that public policy is insignificant on a motion for transfer under Section 1404(a) in effect overruled the *Bremen* public policy test; and whether that holding should extend to motions to dismiss under Section 1406(a). The reasons for extending *Stewart* are compelling. For instance, *Stewart* noted that if a state cannot usurp a district court's discretion by holding a forum selection automatically enforceable, "it makes no sense for it to be able to do so by holding the clause automatically void." *Stewart*, 487 U.S. at 31 n. 10. That reasoning should apply regardless of whether the context is a motion to dismiss or a motion to transfer, and if *Stewart* overruled

2. The Ninth Circuit's Opinion Regarding The Correct Burden Of Proof On A Motion For Transfer Under Section 1404(a) Is In Conflict With The Decisions Of At Least Two United States Courts Of Appeals

A. Employing The Correct Burden Of Proof Involves An Important Question Of Federal Law Because, As Is The Situation Here, Entire Cases Often Turn On That Issue

The Supreme Court held long ago that "[i]n all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). More recently, Justices Blackmun and Stevens reaffirmed the importance of applying the correct burden of proof, citing the above *Speiser* language as part of their dissent in *Medina v. California*, 505 U.S. 437, 464 (1992)(Blackmun, J., dissenting).

This case is an example of the type of matter in which misapplying the correct burden of proof was

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Bremen's public policy test under Section 1404(a), the same analysis should apply under Section 1406(a). The Fifth Circuit observed that "we might expect in a proper case for *Bremen* to be modified to match *Stewart*." *International Software Systems, Inc. v. Amplicon*, Inc., 77 F.3d 112, 115 n.5 (5th Cir. 1996). This may be just such a case.

outcome-determinative. The Ninth Circuit held that the District Court did not abuse its discretion in denying GNC's Section 1404(a) motion to transfer based on the conclusion that "GNC failed to meet its burden of showing that Pennsylvania was the more appropriate forum for the action." *Jones*, 211 F.3d at 499. The Ninth Circuit (and the District Court before it) almost certainly would have reached a different conclusion if they had shifted the burden of proof to Jones to explain why his venue agreement with GNC should not have been enforced.

Because employing the correct burden of proof is an important question of federal law, the fact that several circuits have split on how they define that burden for purposes of a Section 1404(a) motion is grounds for review under this Court's Rule 10(a).

B. Review Should Be Granted So This Court Can Resolve The Split Among Courts Of Appeals Regarding The Correct Burden Of Proof On A Motion For Transfer Under Section 1404(a)

The Ninth Circuit held that GNC bore the burden on its Section 1404(a) motion of proving that Pennsylvania was an adequate alternative forum. *Jones*, 211 F.3d at 499 n.22. In so doing, the Ninth Circuit joined a circuit split that is now ripe for this Court to resolve.

In *Stewart*, the Supreme Court held that in ruling on a Section 1404(a) motion, a forum selection clause should be "a significant factor that figures centrally in the district court's calculus." *Stewart*, 487 U.S. at 29. Put another way, "a valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* at 33 (Kennedy, J., concurring). On a subsequent appeal after the *Stewart* case was remanded, the Eleventh Circuit decided to "adhere to the reasoning advanced by the Supreme Court," holding that "when a motion under section 1404(a) seeks to enforce a valid, reasonable choice of forum clause, the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute." *In Re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989).

Using similar reasoning, and expressly citing both *Stewart* and *In Re Ricoh*, the Third Circuit came to the same conclusion regarding the burden of proof on a Section 1404(a) motion:

> Where the forum selection clause is valid, which requires that there have been no "fraud, influence, or overweening bargaining power," see [*Bremen*], the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum.

Jumara v. State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1995).

The Ninth Circuit's opinion establishing that a party seeking to enforce a forum selection clause under Section 1404(a) bears the burden of proof stands squarely opposed to the rules announced in the Eleventh and Third Circuits. Moreover, the opinion deepens a preexisting split between the Eleventh and Third Circuits on the one hand, and the Second Circuit on the other.[8]

More recently, the Eighth Circuit expressly sidestepped, at least temporarily, this issue. *See Terra International, Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688 (8th Cir. 1997). There, the district court had held that the party opposing enforcement of a forum selection clause on a Section 1404(a) motion bore the burden of proving why enforcement should be denied. The Third Circuit noted that *In Re Ricoh* and *Jumara* supported that view, but declined to offer its own opinion because it agreed with the district court that regardless of who bore the burden, transfer would be appropriate. *Id.* at 695-696.[9]

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8 At least one commentator has characterized a Second Circuit case decided shortly after *Stewart* as failing to shift the burden of proof to plaintiffs on a Section 1404(a) motion even in the face of a forum selection clause. *See* 17 Moore's Federal Practice § 111.13[1][p], n.142 (Matthew Bender 3d ed.), citing *Red Bull Associates v. Best Western International, Inc.*, 862 F.2d 963, 966-967 (2d Cir. 1988).

9 Although in *Terra* the burden of proof did not prove dispositive, that case was simpler to decide because there was no claim that a "public policy" precluded enforcement of the forum selection clause.

Thus, the rule in the Eleventh and Third Circuits, consistent with *Stewart*, is that on a Section 1404(a) motion involving a forum selection clause, the burden shifts from the moving party to the opposing party after an initial showing by the movant that the clause is not unreasonable. The Ninth and Second Circuits on the other hand, do not authorize such burden shifting; and the Eighth Circuit declined to weigh in on the debate.

In light of the evident confusion among at least five circuit courts on this important issue this Court's intervention is necessary, and review, therefore, should be granted.

3. Conclusion

The Ninth Circuit has deviated from the rule of federal supremacy in venue matters and has authorized states to control federal venue in diversity actions by passing statutes that contradict the strong presumption established by this Court in favor of forum selection clauses. In addition, the Ninth Circuit has now worsened a split among circuit courts regarding the proper burden of proof on a Section 1404(a) motion, and in doing so again ran counter to the reasoning of this Court's prior decisions.

Therefore, and for all the reasons explained above, Petitioner GNC Franchising, Inc. requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and that it then proceed to

rule on the merits of the important issues raised by this matter.

Dated: July 31, 2000

Respectfully Submitted,

HOWARD A. KROLL
Counsel of Record
BRIAN K. BROOKEY
CHRISTIE, PARKER & HALE, LLP

JONATHAN C. SOLISH
JENKENS & GILCHRIST
Counsel for Petitioner
GNC FRANCHISING, INC.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES B. JONES,
Plaintiff-Appellee,

v.

GNC FRANCHISING, INC., a Pennsylvania Corporation; and DOES 1 through 50,
Defendant-Appellant.

No. 99-55633
D.C. No.
CV-98-10611-DMT
OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
March 13, 2000—San Francisco, California

Filed May 3, 2000

Before: Henry A. Politz,[1] Stephen Reinhardt, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Politz

COUNSEL

Philip A. Kramer, Kramer & Kaslow, Los Angeles, California, for the plaintiff-appellee.

Jonathan Solish, Law Offices of Garrett J. Zelen, Los Angeles, California, and Howard A. Kroll, Preston Gates & Ellis, Los Angeles, California, for the defendant-appellant.

OPINION

POLITZ, Circuit Judge:

GNC Franchising, Inc., challenges the district court's refusal to enforce a forum selection clause in its franchise agreement with Charles B. Jones. The company contends that the court erred in denying its motion to either dismiss or transfer venue under 28 U.S.C. §§ 1404 and 1406. For the reasons assigned, we affirm.

BACKGROUND

GNC, a subsidiary of General Nutrition Companies, Inc., is franchisor of General Nutrition Stores throughout the United

States. The company's principal place of business is Pittsburgh, Pennsylvania. Jones is the franchisee of a GNC store in LaVerne, California.

In January 1995 and August 1996, the parties entered into written agreements, including an Option Agreement and a Franchise Agreement, for Jones' store. Each agreement contains a choice of law clause requiring that it be "interpreted and construed under the laws of the Commonwealth of Pennsylvania, which laws shall prevail in the event of any conflict of law." Both agreements also contain a forum selection clause providing that any action instituted by a franchisee against GNC "in any court, whether federal or state, shall be brought only within the Commonwealth of Pennsylvania in the judicial district in which Franchisor has its principal place of business; and the parties waive all questions of personal jurisdiction or venue for the purpose of carrying out this provision."

A dispute about the agreements arose and Jones filed suit in California state court alleging multiple causes of action.[2] GNC timely removed the litigation to federal court, invoking diversity jurisdiction.[3] The company subsequently moved to either dismiss or transfer venue to the Western District of Pennsylvania, citing 28 U.S.C. § 1406(a).[4] Alternatively, GNC sought a transfer of venue under 28 U.S.C. § 1404(a).[5]

---

[2]Jones' claims include: (1) breach of written contract, (2) negligence, (3) breach of the covenant of good faith and fair dealing, (4) selling franchises by means of untrue or misleading statements, (5) intentional misrepresentation of fact, (6) negligent misrepresentation of fact, and (7) intentional interference with contractual relations.

[3]The district court *sua sponte* remanded the action to state court based upon lack of diversity jurisdiction after GNC's initial removal attempt. Upon GNC's second attempt at removal, the court determined that it had diversity jurisdiction.

[4]"The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a).

[5]"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

After considering the motions and Jones' response, the district court denied the motion to dismiss or transfer under § 1406(a), concluding that the forum selection clause was unenforceable because it contravened California's strong public policy against such provisions. The court also denied the motion to transfer under § 1404(a) after weighing the relevant factors under the requisite "interest of justice" analysis.

GNC petitioned for permission to appeal the district court's decision, citing 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5. Permission was granted.

ANALYSIS

I. Enforcement of the Forum Selection Clause under § 1406

[1] In diversity cases, federal law governs the analysis of the effect and scope of forum selection clauses.[6] We have held that the rule set forth by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*[7] controls the consideration of a motion to dismiss for improper venue based upon a forum selection clause.[8]

[2] In *Bremen*, the Supreme Court held that a forum selection clause is presumptively valid and should not be set aside unless the party challenging the clause "clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[9] The court added, however, that a contractual forum selection clause is "unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought,

[6] *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988)

[7] 407 U.S. 1 (1972).

[8] *Manetti-Farrow*, 858 F.2d at 513.

[9] 407 U.S. at 15.

whether declared by statute or by judicial decision."[10] Moreover, even though a clause is the product of a full and free bargaining process, and contravenes no public policy of the forum, it "may nevertheless be 'unreasonable' and unenforceable if the chosen forum is seriously inconvenient for the trial of the action."[11] The party challenging the forum selection clause bears a "heavy burden" of establishing the existence of one of the aforementioned grounds for rejecting its enforcement.[12]

[3] The district court declined to enforce the parties' contractual forum selection clause, concluding that it contravened California's strong public policy against enforcing such clauses in franchise agreements, as expressed in § 20040.5 of the California Business and Professions Code. Section 20040.5 provides that "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state."[13] The forum selection clause at bar would restrict venue to Pennsylvania courts. It is apparent that § 20040.5 is intended to void this clause with respect to any claim arising under or relating to the agreement involving the franchise located in LaVerne, California. GNC, however, contends that the district court erred in concluding that the California statute embodies a strong public policy interest precluding enforcement of the clause under federal law.

[4] We find this contention to be without merit. *Bremen*

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[10] *Id.*

[11] *Id.* at 16. "In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18.

[12] *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336, 1338 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998).

[13] CAL. BUS. & PROF. CODE § 20040.5 (West 1997).

teaches that a strong public policy may be "declared by statute."[14] By voiding any clause in a franchise agreement limiting venue to a non-California forum for claims arising under or relating to a franchise located in the state, § 20040.5 ensures that California franchisees may litigate disputes regarding their franchise agreement in California courts.[15] We conclude and hold that § 20040.5 expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue. A provision, therefore, that requires a California franchisee to resolve claims related to the franchise agreement in a non-California court directly contravenes this strong public policy and is unenforceable under the directives of *Bremen*. Accordingly,

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[14]*Bremen*, 407 U.S. at 15.

[15]The legislative history of § 20040.5 provides further evidence that the statutory prohibition against such forum selection clauses reflects a strong state public policy interest. The author of the bill that became § 20040.5 stated that the bill's purpose was "to ensure that California franchisees are not unfairly forced to litigate claims arising out of their franchise agreement in an out-of-state court at considerable expense, inconvenience, and possible prejudice to the California franchisee." Report to Senate Judiciary Committee, 1993-94 Regular Session, AB 1920 (Peace), at 1. The author was motivated by the concern that

> [m]any franchise contracts contain clauses that require a civil action or proceeding arising under or relating to a franchise agreement to be commenced in a designated out-of-state venue, which is usually the state of the franchisor's headquarters. Few franchisees can easily afford to defend or prosecute their actions in another state. The author of AB 1920 contends that these contractual provisions put the California franchisee at a great disadvantage in pursuing meritorious actions against a franchisor. Moreover . . . these provisions are usually part of the standard contract which the franchisee is offered on a "take-it or leave-it" basis. In the absence of arms length negotiations and equal bargaining position, such terms are usually unconscionable. The author asserts that it is in the state's interest and powers to void such contractual terms to protect its residents.

Id. at 2.

we affirm the district court's order denying GNC's motion to dismiss or transfer the action under § 1406(a).

II. Transfer of Venue under § 1404(a)

GNC also claims error in the district court's denial of its motion to transfer venue to the Western District of Pennsylvania under the provisions of § 1404(a). We review that order for abuse of discretion.[16]

[5] Under § 1404(a), the district court has discretion "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' "[17] A motion to transfer venue under § 1404(a) requires the court to weigh multiple factors in its determination whether transfer is appropriate in a particular case.[18] For example, the court may consider: (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.[19] Additionally, the presence of a forum selection clause is a "significant factor" in the court's § 1404(a) analysis.[20] We

[16] *Lou v. Belzberg*, 834 F.2d 730, 734 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

[17] *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (citation omitted).

[18] *Id.*

[19] *See, e.g., Stewart*, 487 U.S. at 29-31; *Lou*, 834 F.2d at 739.

[20] *Stewart*, 487 U.S. at 29 (holding that § 1404(a) governed a forum non conveniens motion to transfer based upon a forum selection clause despite the current forum's public policy that "may refuse to enforce" such provisions). A forum selection clause, however, is not dispositive. *Id.* at 31.

also conclude that the relevant public policy of the forum state, if any, is at least as significant a factor in the § 1404(a) balancing.[21]

[6] The district court weighed each of the aforementioned factors and concluded that GNC failed to meet its burden of showing that Pennsylvania was the more appropriate forum for the action.[22] Although the forum selection clause designates Pennsylvania as the exclusive forum, the court determined that other factors "clearly" demonstrated that California was more appropriate. For example, the court found that the vast majority of the other agreements underlying Jones' claims were negotiated and executed in California. The court noted that Jones chose California as the forum for his lawsuit, and his choice is supported by California's strong public policy to provide a protective local forum for local franchisees. The court further found that the extent of the parties' contacts with Pennsylvania and California clearly favored California, and that Jones' claims arose out of the construction and initial operation of the store located in LaVerne, California. The court also concluded that the relative financial burdens of litigating in each of the forums favored California. Finally, the court noted that more of the relevant witnesses and other sources of proof were located in California. Review of the relevant law and record on appeal

[21]Although the majority opinion in *Stewart* did not expressly state that the law of the forum is a relevant factor for consideration under § 1404(a), the Court noted that the district court must weigh "those public-interest factors of systemic integrity and fairness that . . . come under the heading of 'the interest of justice.' " *Id.* at 30. In a concurring opinion, Justice Kennedy and Justice O'Connor recognized that "state policies should be weighed in the balance." *Id.* at 33. We conclude that the public policy of the forum is not dispositive in a § 1404(a) determination but, rather, it is another factor that should be weighed in the court's § 1404(a) "interest of justice" analysis.

[22]Under the doctrine of forum non conveniens, GNC bears the burden of proving that an adequate alternative forum exists. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983).

persuades us that the trial court did not abuse its discretion in denying the motion to transfer venue under § 1404(a).

The judgment appealed is, in all respects, AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES B. JONES, an Individual,

DMT

Plaintiff-Respondent,

v.

GNC FRANCHISING, INC., a Pennsylvania Corporation, et al.,

Defendants-Petitioners.

No. 99-80069

DC# CV-98-10611-

Central California

ORDER

FILED APR 22 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: RYMER and WARDLAW, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioners shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX C

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Attorneys for Defendant
GNC FRANCHISING, INC.

FILED CLERK U.S. DISTRICT COURT, March 11, 1999, CENTRAL DISTRICT OF CALIFORNIA BY DEPUTY

LODGED CLERK, U.S. DISTRICT COURT, March 10, 1999, CENTRAL DISTRICT OF CALIFORNIA BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES B. JONES, an individual,

Plaintiff,

Case No. 98-10611 DT (Ex)

STIPULATION CERTIFYING ORDER FOR IMMEDIATE APPEAL,

v.

GNC FRANCHISING, INC., a Pennsylvania Corporation; and DOES 1 through 50,

Defendants.

AND STAYING FURTHER PROCEEDINGS, PURSUANT TO 28 U.S.C. § 1292(b); [PROPOSED] ORDER PURSUANT TO STIPULATION

Date: March 1, 1999
Time: 10:00 a.m.
Place: 225 East Temple St.
Courtroom 880
Honorable Dickran Tevrizian

Plaintiff Charles B. Jones and defendant GNC Franchising, Inc. ("GNC") stipulate as follows:

FACTUAL RECITAL

(1) On March 1, 1999, the Court, the Honorable Dickran Tevrizian presiding, denied GNC's motion to dismiss plaintiff's action for improper venue under 28 U.S.C. section 1406(a), or in the alternative to transfer plaintiff's action to the Western District of Pennsylvania pursuant to 28 U.S.C. section 1404(a). The Court's written order (the "Order") was entered on March 1, 1999.

(2) The Order involved the following controlling questions of law: (a) whether, in an action pending in

federal court, a forum selection clause in a franchise agreement is enforceable on a motion under 28 U.S.C. section 1406(a) despite a California statute - Business & Professions Code section 20040.5 - rendering such clauses invalid as a matter of state substantive law; and (b) if not, whether the policy considerations underlying that state statute properly may be considered by a District Court in ruling on a motion to dismiss or transfer for improper venue.

(3) A substantial ground for difference of opinion exists concerning these controlling questions of law because neither the Ninth Circuit nor the United States Supreme Court has squarely addressed these issues. As a result, there currently are conflicting decisions regarding the appropriate analysis to be employed in motions to dismiss or transfer based on forum selection clauses in franchise agreements. Specifically, while this Court denied GNC's motion, Judge Linda H. McLaughlin of the United States District Court for the Central District of California previously transferred a similar lawsuit to the Western District of Pennsylvania on the basis of an identical forum selection clause;[1] and, more recently, Judge Charles A. Legge of the United States District Court for the Northern District of California dismissed another action based on the identical forum selection clause.[2]

---

[1] See Order Transferring Action, entered July 10, 1998 in *Watt v. GNC Franchising, Inc.*, U.S.D.C. No. SACV 98-450 LHM (Eex).

[2] *See* Order Dismissing Amended Complaint for Improper

(4) Certification of the Court's order will materially advance the termination of this litigation because, if the Ninth Circuit determines that the forum selection clause should have been enforced, this action will be dismissed in its entirety.

(5) Because the appeal of the Court's March 1, 1999 order could dispose of the entire lawsuit, the parties agree that all further proceedings in this matter should be stayed pending a resolution of GNC's appeal.

STIPULATION

THEREFORE, plaintiff Charles B. Jones and defendant GNC Franchising, Inc., through their attorneys of record, stipulate that the Court's March 1, 1999 Order be certified for immediate appeal, pursuant to 28 U.S.C. section 1292(b); and that, pending the disposition of the appeal by the Ninth Circuit, all proceedings in this matter be stayed.

Venue, filed December 11, 1998 in *Von Thury v. GNC Franchising, Inc.*, U.S.D.C. No. C 98-4098 CAL.

DATED: March 10, 1999 PRESTON GATES & ELLIS LLP
HOWARD A. KROLL
BRIAN K. BROOKEY
CAROLYN E. SIEVE
By /s/ Brian K. Brookey
Brian K. Brookey
Attorneys for Defendant
GNC Franchising, Inc.

DATED: March 10, 1999 KRAMER & KASLOW, PC

PHILIP A. KRAMER
JOHN JAHRMARKT

By /s/ Philip A. Kramer
Philip A. Kramer
Attorneys for Plaintiff
Charles B. Jones

ORDER PURSUANT TO STIPULATION

IT IS SO ORDERED.

DATED: March 11, 1999

/s/DickranTevrizian
JUDGE OF THE U.S.
DISTRICT COURT

PROOF OF SERVICE

I, LETICIA SANCHEZ, declare as follows:

I am a citizen of the United States and a resident of the County of Los Angeles; I am over the age of 18 years and am not a party to the within action or proceeding. I am employed by the law firm of Preston Gates & Ellis LLP, located at 725 South Figueroa Street, Suite 2100, Los Angeles, California 90017.

On March 10, 1999, I served the foregoing document described as: STIPULATION CERTIFYING ORDER FOR IMMEDIATE APPEAL, AND STYING FUTHER PROCEEDINGS, PURSUANT OT 28 U.S.C. § 1292(B); [PROPOSED] ORDER PURUSANT OT STIPULATION on the interested parties in this action by placing a true copy thereof enclosed in an envelope addressed as follows:

Philip A. Kramer, Esq.
KRAMER & KASLOW, PC
2029 Century Park East, 17th Floor
Los Angeles, California 90067
Telephone No.: (310) 553-3838
Facsimile No.: (310) 553-3939

[X] (BY MAIL) The envelope was mailed with postage thereon fully prepaid. As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware

that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed this 10th day of March 1999 at Los Angeles, California.

/s/ Leticia Sanchez
LETICIA SANCHEZ

PROOF OF SERVICE

I, LETICIA SANCHEZ, declare as follows:

I am a citizen of the United States and a resident of the County of Los Angeles; I am over the age of 18 years and am not a party to the within action or proceeding. I am employed by the law firm of Preston Gates & Ellis LLP, located at 725 South Figueroa Street, Suite 2100, Los Angeles, California 90017.

On March 15, 1999, I served the foregoing document described as: SIGNED ORDER PURSUANT TO STIPULATION: STIPULATION CERTIFYING ORDER FOR IMMEDIATE APPEAL, AND STAYING FURTHER PROCEEDINGS, PURSUANT TO 28 U.S.C. § 1292(B) on the interested parties in this action by placing a true copy thereof enclosed in an envelope addressed as follows:

Philip A. Kramer, Esq.
KRAMER & KASLOW, PC
2029 Century Park East, 17th Floor
Los Angeles, California 90067
Telephone No.: (310) 553-3838
Facsimile No.: (310) 553-3939

[X] (BY MAIL) The envelope was mailed with postage thereon fully prepaid. As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware

that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed this 15th day of March 1999 at Los Angeles, California.

/s/ Leticia Sanchez
LETICIA SANCHEZ

APPENDIX D

Filed March 1, 1999
Entered March 2, 1999
Clerk U.S. District Court
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES B. JONES, an individual,

Plaintiff,

v.

GNC FRANCHISING, INC., a Pennsylvania Corporation; and DOES 1 through 50,

Defendants.

CASE NO. 98-10611 DT (SHx)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1406(a) AND DENYING DEFENDANT'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a); AND FINDING THAT PLAINTIFF HAS WAIVED HIS RIGHT OF TRIAL BY JURY

I. Background

A. Factual Summary

This case involves claims brought by Plaintiff Charles B. Jones ("Plaintiff") against GNC Franchising, Inc. ("Defendant") and Does 1 through 50. Plaintiff alleges claims of damages based upon (1) breach of written contract, (2) negligence, (3) breach of the covenant of good faith and fair dealing, (4) selling franchises by means of untrue or misleading statements, (5) intentional misrepresentation of fact, (6) negligent misrepresentation of fact, and (7) intentional interference with contractual relations.

Under the trademark "General Nutrition Center," Defendant sells "vitamins, health foods, diet products, natural cosmetics, fitness products and other health-related products" through its franchises and company-owned stores. *See* Complaint, ¶ 5. On or about January 13, 1995, Plaintiff and Defendant allegedly entered into an agreement (the "Option Agreement") by which Plaintiff paid $20,000 to Defendant for the franchise right to operate a General Nutrition Center outlet. *See id.* at ¶ 6. The Option Agreement required Plaintiff to obtain from Defendant prior approval of the prospective location of the franchise store. *See id.* at ¶ 7. In January of 1996, Plaintiff asserts that he proposed to Defendant three possible sites for the franchise store, one of which was in the City of LaVerne ("LaVerne"). Plaintiff indicated a

preference for LaVerne, and Defendant gave its approval to operate the franchise store in LaVerne. *See id.* at ¶ 8.

Pursuant to the Option Agreement, Plaintiff had the right to negotiate and execute his own lease, but Defendant allegedly interfered by sending its own agent to negotiate the lease at LaVerne. On or about February 28, 1996, Plaintiff received a draft of the lease as negotiated by Defendant, which Plaintiff claims was "oppressive and unduly burdensome" on him. Plaintiff contends he was unable to negotiate further because "the landlord already had a lease agreed to by [Defendant]," thus rendering Plaintiff unable to obtain an acceptable lease at LaVerne. *See id.* at ¶ 9. Plaintiff asserts further interference by Defendant by claiming that Defendant "surveyed the proposed site, and engineered, designed and drew complete plans . . . fabricated and actually installed signs . . . and delivered merchandise" to the LaVerne location, even though Plaintiff had never signed a lease for LaVerne. *Id.* at ¶ 10.

After losing the lease at LaVerne, Plaintiff allegedly reached an agreement to lease a space at a nearby shopping mall, the Village LaVerne ("Village LaVerne"), and on May 9, 1996, informed Defendant of the signing of the lease. *See id.* at ¶ 11. Pursuant to the Option Agreement, Plaintiff had the right to select a contractor for the construction of the franchise store without involving Defendant. But instead, Plaintiff contends that Defendant hired a contractor on its own and began construction without Plaintiff's authorization. *See id.* at ¶ 12. The

construction began on July 5, 1996. *See id.* Plaintiff and Defendant entered into a franchise agreement ("Franchise Agreement") regarding the Village LaVerne site on or about August 22, 1996. *See id.* at ¶ 13. The Franchise Agreement, along with the Option Agreement, did not authorize Defendant to supervise or contract for the construction of Plaintiff's franchise store. *See id.* at ¶ 17.

Plaintiff's first claim is for breach of contract. Plaintiff contends that, during the course of the construction, Defendant violated the terms of its own written policies and the Franchise Agreement with the following conduct:

1. Defendant failed to provide Plaintiff with critical documents in connection with the construction.
2. Defendant signed contractor change orders as "owner" without the knowledge or authorization of Plaintiff.
3. Defendant failed to provide a list of fixtures prior to construction, thereby denying Plaintiff the right to accept or reject optional fixtures.
4. Defendant charged Plaintiff for construction work performed at LaVerne, even though Plaintiff never signed a lease at LaVerne and was never informed of the work performed at LaVerne.
5. Defendant failed to obtain Plaintiff's approval for installing signage that was

excessively costly and improperly installed. Defendant forced Plaintiff to pay for this signage signs and other items by threatening to revoke Plaintiff's franchise.

6. Defendant installed a second signage in the rear of Plaintiff's store in violation of the instructions from the LaVerne Department of Building and Safety. Defendant passed on the costs thereby incurred to Plaintiff.

7. Defendant installed white tile in Plaintiff's store that did not match the samples that Plaintiff approved. The tiles are nearly impossible to clean and Defendant has failed to rectify the problem.

8. Defendant ignored a request by Plaintiff to install a membrane underneath the ceramic tile floor that would prevent floor damage in the event of an earthquake.

See id. at ¶14.

Plaintiff's second claim is for negligence. Plaintiff contends that he hired Mike Manougian ("Manougian") as his store manager based upon Defendant's representation of Manougian as honest and experienced. During Manougian's employment, approximately $14,000 in inventory was stolen. *See id.* at ¶¶ 22, 23. Plaintiff claims that Defendant breached its duty of care by failing to inform Plaintiff of Manougian's past employment history, including Manougian's termination from a company-owned General Nutrition Center store due to his

suspected involvement in a missing bank deposit. *See id.* at 25. Additionally, Plaintiff claims Defendant breached its duty of reasonable care in its supervision of the construction of Plaintiff's store, thereby incurring unreasonable expenses. *See id.* at ¶¶ 26, 27.

Plaintiff's third claim is for breach of the covenant of good faith and fair dealing. First, Plaintiff contends that Defendant breached these implied covenants by performing the aforementioned acts. Second, Plaintiff alleges that Defendant breached these covenants by including misleading statements in its Uniform Franchising Circular ("UFOC") and omitting material facts necessary to prevent those statements from being misleading. *See id.* at ¶ 31.

Plaintiff's fourth through sixth claims are selling franchises by means of untrue or misleading statements, intentional misrepresentation of fact, and negligent misrepresentation of fact. Plaintiff bases these claims on alleged false or misleading statements in Defendant's UFOC, which is "a document filed with the California Department of Corporations pursuant to the Franchise Investment Law and is used by Defendant for the purpose of offering and selling GNC franchises." *Id.* at ¶ 37. Plaintiff contends that Defendant could have corrected the misleading statements by revealing the following "significant and material facts:"

1. July 28, 2000 The best locations for General Nutrition Center stores are reserved for company-owned stores and

not approved for franchise stores.

2. Sites in shopping centers containing more than 350,000 square feet of commercial area are not approved for franchise stores.
3. Franchise stores are charged more for merchandise than company-owned stores.
4. Financial information outlined in the UFOC is mostly derived from financial data from the company-owned stores and excludes such data from franchise stores, giving a misleading expectation of profitability.

See id. at ¶¶ 37, 39(a)-(d).

Plaintiff asserts that, at the time he signed the Option Agreement, Franchise Agreement, and the lease at Village LaVerne, he could not have perceived Defendant's UFOC to be misleading and could not have discovered the aforementioned "significant and material facts" which were not included in the UFOC. Plaintiff contends that he would not have entered these agreements had he known the statements in the UFOC were false and/or that the UFOC omitted material statements such that it was misleading.

Plaintiff's seventh claim is for intentional interference with contractual relations. Plaintiff bases this claim on Defendant's alleged interference with the Plaintiff's contractual relationships with contractors, subcontractors, and landlords that Plaintiff formed in connection with his franchise store. *See id.* at ¶ 61.

B. Procedural Summary

On June 5, 1998, Plaintiff filed his Complaint in the Superior Court of the State of California for the County of Los Angeles.

On July 15, 1998, Defendant filed a Notice of Removal in this Court based upon complete diversity and an amount in controversy exceeding $75,000.

On July 24, 1998, this Court issued an Order to Show Cause Why Action Should Not Be Remanded to State Court for Lack of Federal Jurisdiction. On August 7, 1998, Defendant filed a Response to the Order to Show Cause. On August 14, 1998, Plaintiff filed a Reply to Defendant's Response. On August 21, 1998, this Court issued an Order *Sua Sponte* Remanding Action to State Court for Lack of Federal Jurisdiction.

On December 30, 1998, Defendant again filed a Notice of Removal based upon complete diversity and an amount in controversy exceeding $75,000.

On February 3, 1999, this Court issued an Order to Show Cause Why Action Should Not Be Remanded To State Court For Lack of Federal Diversity Jurisdiction. On February 16, 1999, Defendant filed a Response to this Order. On February 23, 1999, Plaintiff filed a Reply to Defendant's Response. Based upon these pleadings, this Court determined that it has proper diversity jurisdiction over this case.

On January 29, 1999, Defendant filed a Motion to Dismiss Plaintiff's Complaint or to Transfer Plaintiff's

Action to the Western District of Pennsylvania for Improper Venue pursuant to 28 U.S.C. § 1406(a), or in the alternative, a Motion to Transfer Plaintiff's Action to the Western District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). These motions are presently before this Court.

II. Discussion

A. Standard

1. Motion to Dismiss or Transfer Pursuant to 28 U.S.C. § 1406(a)

Rule 12(b)(3) of the Federal Rules of Civil Procedure provides that a defendant may seek to dismiss a complaint for "improper venue." Fed. R. Civ. P. 12(b)(3). Under 28 U.S.C. § 1406(a), the district court, where a case has been filed but venue is improper, has the discretion to dismiss the case "or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

2. Motion to Transfer Pursuant to 28 U.S.C. § 1404(a)

A defendant can also seek a transfer of venue under the doctrine of forum non conveniens. 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

B. Discussion

1. Dismissal or Transfer Pursuant to 28 U.S.C. § 1406(a) is Not Proper

Defendant contends that venue is improper in this Court because of the forum selection clause contained in the Franchise Agreement entered into by Plaintiff and Defendant, which provides:

> The Parties agree that any action brought by Franchisee against Franchisor in any court, whether federal or state, shall be brought [sic] only within the Commonwealth of Pennsylvania in the judicial district in which the Franchisor has its principal place of business, and the parties waive all questions of personal jurisdiction or venue for the purposes of carrying out this provision.

Motion to Dismiss, p. 7. Thus, Defendant asserts that because the Franchise Agreement states that Pennsylvania is the "only" proper venue for the type of action that Plaintiff is bringing, this Court must dismiss Plaintiff's Complaint or transfer Plaintiff's action to the Western District of Pennsylvania pursuant to 28 U.S.C. § 1406(a).

The Ninth Circuit has consistently held that, in federal diversity cases, the validity and effect of a forum selection clause is a procedural and not a substantive question. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). Therefore, a motion

to dismiss for improper venue based upon a forum selection clause is decided under federal law. *See id.*

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), the United States Supreme Court held that a forum selection clause is presumptively valid and should not be set aside unless the party challenging the clause "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Although *Bremen* was an admiralty case, courts have widely applied its holding to forum selection clauses generally. *See e.g., R.A. Argueta v. Banco Mexicano, S,A,,* 87 F.3d 320 (9th Cir. 1996) (applying *Bremen* to affirm enforcement of a forum selection clause in loan agreements); *Spradlin v. Lier Siegler Management Servs. Co.*, 926 F.2d 865, 867 (9th Cir. 1991) (applying *Bremen* to affirm enforcement of a forum selection clause in an employment contract); *Manetti-Farrow*, 858 F.2d at 512 (applying *Bremen* to affirm enforcement of a forum selection clause in an exclusive dealership contract). Moreover, the Ninth Circuit has held that "where venue is specified with mandatory language, the clause will be enforced." *Docksider, LTD. v. Sea Technology, LTD.*, 875 F.2d 762, 764 (9th Cir. 1989).

Accordingly, a party challenging a forum selection clause bears a "heavy burden" of proof. *See Bremen*, 407 U.S. at 18. Under federal law, parties can establish that a forum selection clause is "unreasonable" by showing that (1) the incorporation of the forum selection clause into the

contract was the result of "fraud, undue influence, overweening bargaining power," *Carnival Cruise Lines, Inc.*, 499 U.S. 585, 591 (1991); (2) the contractually chosen forum will be "so gravely difficult and inconvenient" that the challenging party will "for all practical purposes be deprived of his day in court." *Bremen*, 407 U.S. at 18; or (3) enforcement of the clause would "contravene a strong public policy of the forum in which the suit is brought." *Id.* at 15.

In the present case, Plaintiff contends that the forum selection clause contained in the Franchise Agreement is unreasonable and, thus, unenforceable under the last of the aforementioned grounds. Plaintiff claims that enforcement of the forum selection clause would contravene California's strong public policy against enforcing such clauses contained in franchise agreements as pronounced in California statutory law. This Court agrees.

Section 20040.5 of the California Business and Professions Code provides:

> A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.

California courts have recognized that Section 20040.5 is a "critical feature" of the antiwaiver provision of California's Franchise Investment Law, which voids any

contractual provision in a franchise agreement that forces a franchisee to give up any of the protections afforded by the law. *See Wimsatt v. Beverly Hills Weight Loss Clinics international, Inc.*, 32 Cal.App.4th 1511, 1513-14 (1995). The state legislature's purpose in enacting the antiwaiver provision was to provide "special protection" to franchisees in dealing with franchisors because

> California franchisees have suffered substantial losses *where the franchisor or his representative has not provided full and complete information regarding the franchisor-franchisee relationship,* the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor.

Id. at 1513 (quoting the California Franchise Investment Law's statement of legislative intent) (emphasis added); *see also Keating v. Superior Court,* 31 Cal.3d 584, 593-94 (1982). The present case presents the precise problem which California's policy against forum selection clauses in franchise agreements was designed to remedy. Namely, Plaintiff, a California franchisee, claims he has suffered financial losses due to the misleading or incomplete information provided to him by Defendant, an out-of-state franchisor.

Although this Court is not aware of any Ninth Circuit case that squarely addresses the validity of a forum selection clause in light of a contrary state policy, Plaintiff has provided persuasive authority from another district that is directly on point. In *ECC Computer Centers of*

Illinois v. Entre Computer Centers, Inc., 597 F.Supp. 1182 (N.D. Ill.), an Illinois district court denied a defendant's motion to dismiss or transfer pursuant to 28 U.S.C. § 1406(a) which was based upon a freely-negotiated forum selection clause contained in a franchise agreement. Similar to California's franchisee protections, the Illinois Franchise Disclosure Act voids any provision in a franchise agreement that designates venue in a forum outside of Illinois. *See id.* at 1184. The court concluded that the federal law presumption favoring forum selection clauses was rebutted because federal courts have consistently recognized that " '[a] contractual choice-of-forum should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.' " *Id.* at 1185 (quoting *Bremen,* 407 U.S. at 15). The court reasoned that enforcing the forum selection clause, which required all cases under the franchise agreement to be brought in Virginia, would directly contravene Illinois' policy banning such provisions because the Illinois statute was "intended to solve some of the 'numerous problems' caused by the sale of franchises in Illinois and to ensure that controversies stemming from such actions will be resolved in Illinois." *Id.*[1]

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[1] The district court in *ECC Computer* declined to decide whether state or federal law applied to determining the validity of a forum selection clause because it concluded that both state and federal law prohibited the enforcement of the clause at issue. *See ECC*

Defendant cites the United States Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1998), for the proposition that "a forum selction clause could be enforced despite the alleged existence of a state public policy against such clauses." Reply, p. 3. However, *Stewart* only addressed the effect of a forum selection clause and contrary local policy on a transfer of venue analysis under 28 U.S.C. § 1404(a), not 28 U.S.C. §1406(a). *See id.* at 27-32. Additionally, Defendant asserts that the Ninth Circuit "extend[ed] the *Stewart* doctrine to motions for dismissal under 28 U.S.C. § 1406(a)" in *Manetti-Farrow*, 858 F.2d 509. Reply, p. 3. Defendant has severely misconstrued the *Manetti-Farrow* holding because the Ninth Circuit stated "[o]ur case involves a motion to dismiss, rather than a transfer of venue, and because there is no federal rule directly on point *the Stewart analysis is inapplicable*." *Manetti-Farrow,* 858 F.2d at 512 n.2 (emphasis added).

Guided by applicable federal precedent and the logical reasoning of *ECC Computer,* this Court finds that the enforcement of the forum selection clause in the present case would contravene California's strong public policy against such provisions contained in franchise agreements. Indeed, California enacted its antiwaiver statute to ensure that California franchisees would have a

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Computer, 597 F.Supp. at 1184. However, it is clear in the Ninth Circuit that federal law applies to such cases and, thus, the Illinois court's federal law analysis is instructive in the present case.

local forum to protect their rights and redress their injuries. The forum selection clause at issue, requiring all actions under the franchise agreement to be brought in Pennsylvania, directly undermines this policy. Accordingly, this Court denies Defendants Motion to Dismiss or Transfer for Improper Venue pursuant to 28 U.S.C. § 1406(a).

2. Transfer of Venue Pursuant to 28 U.S.C. § 1404(a) is Not Warranted

Defendant's motion alternatively asks this Court to transfer this action to the Western District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). Under the doctrine of forum non conveniens, Defendant bears the burden of proving that an adequate alternative forum exists. *See Cheng v. Boeing Co.,* 708 F.2d 1406, 1411 (9th Cir. 1983). Moreover, there are a number of factors that courts consider in determining whether venue is more appropriate in another district: (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation between the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof. *See Lou v. Belzberg,* 834 F.2d 730, 739 (9th Cir. 1987), *cert. denied* 485 U.S. 993 (1988).

In *Stewart,* the United States Supreme Court held that § 1404(a) governed a forum non conveniens motion to transfer based upon a forum selection clause despite the current forum's public policy that "may refuse to enforce" such provisions. *See Stewart,* 487 U.S. at 29-30. The Court reasoned that a forum selection clause "should receive neither dispositive consideration . . . nor no consideration," but rather should be a "significant factor" in the "flexible and multifaceted" Section 1404(a) analysis. *Id.* at 29-31. The Court also noted that the forum's relevant public policy should be integrated into the Section 1404(a) balancing. *See id.* at 30.

Defendant contends that the Section 1404(a) balance tips in favor of the Western District of Pennsylvania as the more appropriate forum for the following reasons: Defendant's principal place of business is located in Pennsylvania; Pennsylvania law applies to this action pursuant to the Franchise Agreement; GNC executives who may be witnesses are located in Pennsylvania; many of the documents pertaining to the franchise relationship are located in Pennsylvania; and the forum selection clause designates Pennsylvania as the exclusive venue. Despite Defendant's asserted connections with Pennsylvania, this Court finds that Defendant has failed to meet its burden under 28 U.S.C. § 1404(a) to show that Pennsylvania is the more appropriate forum for this action.

The Section 1404(a) convenience factors clearly demonstrate that Califronia is a more appropriate forum

for Plaintiff's action. First, although the parties' pleadings do not identify where the Franchise Agreement and Option Agreement were negotiated and executed, the vast majority of the other agreements underlying this case were negotiated and executed in California. For example, the parties dispute their relative participation in the several lease and construction contracts involved in setting up Plaintiff's franchise store. All of these agreements were negotiated and executed in California.

Second, Plaintiff chose California as the forum for his action. Plaintiff's choice of forum is supported by California's strong public policy to provide a protective local forum for its local franchisees.

Third, the litigants' contacts with the respective forums clearly favor California. While Plaintiff's only contact with Pennsylvania is that he chose to go into business with Defendant, Defendant has franchise locations throughout California. Moreover, this Court agrees with Plaintiff that his claims largely arise out of the construction and intitial operation of Plaintiff's franchise store, located in LaVerne, California. For instance, Plaintiff's claims of intentional and negligent misrepresentation arise from Defendant's Uniform Franchise Offering Circular (UFOC), which Defendant filed with the California Department of Corporations. Plaintiff's claims of breach of contract and intentional interference with contractual relations arise from the conduct of Defendant's agents, who were located in California and oversaw the construction of the store.

Also, Plaintiff's claims of negligence arise from an employment recommendation made by Defendant's California "Regional Franchise Consultant."

Fourth, the relative financial burdens imposed by the forums favors California. The financial burden imposed on Plaintiff if he is required to litigate in Pennsylvania is likely to be far greater than the financial impact on Defendant if the action remains in California. Indeed, Defendant has a substantial presence and resources in California.

Finally, more of the relevant witnesses and other sources of proof are located in California. For instance, all of the landlords, contractors, and subcontractors that Plaintiff alleges Defendant illegally negotiated, contracted, or interfered with are located in California. Additionally, all of the contracts and other documentation relating to these transactions are likely to be located in California. Although some of Defendant's executive agents that are involved in this action are located in Pennsylvania, Defendant has at least one agent, its Regional Franchise Consultant, who is located in California.

Although the Pennsylvania choice of law and forum selection provisions in the Franchise Agreement favor a Pennsylvania venue, this Court finds that these considerations are significantly outweighed by the other relevant Section 1404(a) factors that favor California as the appropriate forum for this action. In *Stewart,* the Supreme Court recognized that "[I]t is conceivable that a district court acting under § 1404(a) would refuse to

transfer a case notwithstanding the counterweight of a forum-selection clause" based upon other countervailing "convenience" and "interest of justice" factors. *Stewart*, 487 U.S. at 31. This is such a case. Accordingly, this Court denies Defendant's Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a). This Court finds that venue is proper in the Central District of California and will apply Pennsylvania law to this action pursuant to the choice-of-law provision in the Franchise Agreement.

C. Conclusion

For the foregoing reasons, this Court denies Defendant's Motion to Dismiss Plaintiff's Complaint or Transfer Venue pursuant to 28 U.S.C. § 1406(a). Additionally, this Court **denies** Defendant's Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a).

III. Plaintiff Has Waived His Right to a Trial By Jury

Plaintiff made a demand for a trial by jury in his Reply to Defendant's Opposition to Court's Order to Show Cause Why Action Should Not Be Remanded to State Court for Lack of Federal Jurisdiction. However, pursuant to the Option Agreement and Franchise Agreement, the parties agreed as follows:

> [I]n any litigation, suit, action, counterclaim, or proceeding, whether at law or in equity, which arises out of, concerns, or relates to this Agreement, any and all transactions contemplated hereunder, the

> performance of this Agreement, or otherwise, trial shall be to a court of competent jurisdiction and not to a jury.

(Option Agreement, § 24C; Franchise Agreement, § XXVI, C.) Moreover, the parties "irrevocably waive[d] any right either party may have to a trial by jury." Accordingly, this Court finds that Plaintiff has waived his right to a trial by jury.

IT IS SO ORDERED.

Dated: March 1, 1999

/s/ Dickran Tevrizian
Dickran Tevrizian, Judge
United States District
Court